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In The Supreme Court
of the
United States

October Term, 1993

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation; REASON F. WAREHIME, an individual; DORIS J. WILSON, an individual; and KATHRYN L. HINKLE, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

JESSE BROWN, Secretary for Veterans Affairs; THE DEPARTMENT OF VETERANS AFFAIRS; THE UNITED STATES OF AMERICA; JANET RENO, Attorney General of the United States,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE

Amicus curiae, the Radiation Health Effects Public Interest Law Group (hereafter "RADLAW"), is a non-profit group founded to collect data and provide legal and other resources to radiation-exposed veterans and their families.[1] Much of RADLAW's work is necessary because Veteran's Administration claims are as factually and legally complex as the District Court found them to be in this action. RADLAW was founded to press for reform of the Department of Veteran's Affairs, to make it more responsive to radiation-exposed veterans and to develop education programs for those interested in understanding radiation health issues. RADLAW has worked closely with many members of the class of 10,000 ionizing radiation victims certified below. In the course of its work, RADLAW is conducting the nation's first morbidity studies of veterans exposed to ionizing radiation.

Trinity Post 7-45 is a nationwide non-profit organization of radiation-exposed veterans; it specializes in researching historical records of atmospheric nuclear weapons tests. The Colorado Agent Orange Nuclear Veterans Coalition is a non-profit group formed in 1983 to assist veterans exposed to toxic substances in obtaining benefits. There are currently about 300 veteran members of this group, most of whom have been exposed to Agent Orange or nuclear radiation.

The National Association of Atomic Veterans is a non-profit group established in 1979 to represent veterans exposed to radiation. Its membership consists of roughly 4,000 victims of radiation tests and radiation-related other service activities.

It has been the experience of all Amici that ionizing radiation claims are excessively complex for veterans, and that veterans need counsel to secure their property rights in the benefits for which they apply. Because of

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[1] All Amici received written consent from all parties of record to file this Brief, pursuant to Supreme Court Rule 37.2.

their experience in helping veterans secure these rights, Amici are uniquely qualified to explain why the District Court's findings of claims complexity and attorney value were correct, and why the Ninth Circuit Court of Appeals' failure to defer to those fact findings, and failure to follow this Court's earlier remand order, call for a writ of *certiorari*.

SUMMARY OF ARGUMENT

Ten thousand veterans were exposed to ionizing radiation during their occupation of Japan after World War II, or during their later participation in thermonuclear blast testing in the 1950's. These men continue to suffer radiogenic disease and death as a result. This is a Constitutional challenge to a Civil War-era statute preventing these veterans from retaining counsel to assist them in pursuing statutory benefits arising from their service-related injuries.[2]

Amici ask the Court to finish the task it began in *Walters* in which the Court held that an injunction against enforcement of the attorney limitation statute could be sustained upon a strong factual showing of the risk of claims benefit deprivation, combined with a showing that counsel would sharply reduce the risk of erroneous claims denial. On remand the District Court found all of this. The Ninth Circuit, however, did *not* follow this Court's remand directive in *Walters*, and reversed the District Court, upon an inappropriate *de novo* review of the District Court's findings of fact. *National Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583 (9th Cir. 1993) (hereafter the "*NARS Appeal*"). This Court should not hesitate to grant *certiorari* when the Court of Appeals has flouted the Court's earlier remand order.

The federal issue here is overwhelming. Ten thousand veterans are barred from seeking benefits through a mechanism the District Court found was unconstitutional. This brief focuses upon the factual, scientific, medical and legal complexity facing ionizing radiation claimants.

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2 38 U.S.C. § 5903(1) prohibits attorneys from charging or receiving any fee in veterans' claims. Section 5905 provides a penalty of one year's imprisonment for any attorney violating the fee prohibition. The intended -- and achieved -- effect is to remove counsel from the veterans' claim system.

I. *THE WRIT OF CERTIORARI MUST BE GRANTED TO ENFORCE THIS COURT'S REMAND ORDER IN WALTERS, AND TO REAFFIRM THE UNIVERSAL DEFERENCE GIVEN TO FINDINGS OF FACT BY A TRIAL COURT*

> Congress began providing veterans pensions in early 1789, and after every conflict in which the nation has been involved Congress has, in the words of Abraham Lincoln, 'provided for him who has borne the battle and his widow and his orphan.'

Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 309 (1985) (hereafter "*Walters*").

The Court further noted that the veterans' claims process "is designed to function throughout with a high degree of informality and solicitude for the claimant." *Id.* at 311. With this stated faith in the Nation honoring debts to its veterans, this Court earlier struck down a global injunction barring enforcement of the attorney limitation statute, 38 U.S.C. § 5903(1) (*formerly codified at* 38 U.S.C. § 3403(c)). That ruling prevented veterans from retaining counsel to press complex claims for radiogenic disease arising from nuclear blast exposure, but Amici felt that if this Court's remand order in *Walters* were followed, the statute would inevitably be invalidated on an as-applied basis. The remand order in *Walters* allowed the as-applied challenge, dependent on a strong factual showing of the risk of deprivation of property rights and the benefits of counsel. Following this, the District Court found what Amici have learned through years of hard experience: ionizing radiation claims are far too complex for veterans to pursue without counsel. The Court of Appeal, though, ignored the District Court's fact findings and refused to follow the *Walters* remand. For the reasons set forth below, the Court should grant a writ of *certiorari* to review the Ninth Circuit's failure to follow *Walters*.

A. ***The Supreme Court Directive in Walters***

1. ***This Court Ordered Remand to Determine the Extent to Which the Denial of Counsel, and the Factual and Legal Complexity of Pressing Claims, Deprived Veterans of a Property Right Without Due Process***

When first considered by this Court, this action presented a facial challenge to the attorney limitation statute. In *Walters*, this Court followed the Due Process deprivation test announced in *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), finding that the attorney limitation found in 38 U.S.C. § 3403 (now 38 U.S.C. § 5903) could not be facially enjoined on preliminary injunction. On remand, the District Court made detailed findings of fact concerning each of the Due Process standards articulated in *Matthews* and ordered by *Walters*: (1) the private interests affected; (2) the risk of erroneous deprivation and the probable value of additional procedural safeguards; (3) the government's interest, including fiscal and administrative burdens of additional procedures. Amici here focus upon the second prong of that test.

The *Walters* Court held that an as-applied challenge could be upheld only upon an extraordinarily strong showing of probability of error in the claims process, combined with a showing that counsel would "sharply" diminish that probability. *Walters* at 326. On remand, Plaintiffs were also required to show that the attorney limitation posed "a risk of erroneous deprivation of rights in the generality of cases reached by the injunctive relief." *Id.* at 337 (O'Connor, J., concurring.)

Despite this difficult burden, Plaintiffs proved at trial the enormous factual, medical and scientific complexities of radiogenic disease pathology, and what the District Court found were the "byzantine" legal intricacies of pursuing ionizing radiation claims, as well as finding that attorneys improved a claimant's odds of recovering by a factor of 25. *National Ass'n of Radiation Survivors v.*

Derwinski, 782 F. Supp. 1392, 1395-1407 (N.D. Cal. 1992) (hereafter the "*NARS Facts*.")

B. ***Standards For Granting Certiorari***

Grant of *certiorari* is appropriate because the Ninth Circuit Court of Appeals decided a federal question in conflict with a controlling decision of this Court. Sup. Ct. R. 10.1(c); *Fort Gratiot Landfill v. Michigan Dep't of Natural Resources*, --- U.S. ---, 112 S.Ct. 2019, 2023 (1992) ("we granted *certiorari* because of concern that the decision below was inconsistent with *Philadelphia v. New Jersey*" (citation omitted)); *Montro v. Pape*, 365 U.S. 167, 170 (1960) ("this case is here on a writ of *certiorari* which we granted because of a seeming conflict of [the appellate court's] ruling with our prior cases") (*overruled* on other grounds by *Monell v. Dept. of Social Services of N.Y.*, 436 U.S. 658 (1978)).

This Court has frequently granted *certiorari* when a lower court decided a case inconsistently with the Court's earlier decisions in similar cases. *Pennsylvania v. Finley*, 481 U.S. 551, 554 (1987) (failure to follow earlier decision); *First Nat. Bank v. Cities Service Co.*, 391 U.S. 258, 259 (1987) ("[t]his Court granted *certiorari* to determine whether the decisions below were in conformity with *Poller v. Columbia Broadcasting System*" (citations omitted)); *Wilkinson v. United States*, 365 U.S. 399 (1961) ("[w]e granted *certiorari* to consider the petitioner's claim that the Court of Appeals had misconceived the meaning of the *Barenblatt* decision" (citation omitted)).

Amici do not simply claim that an appellate court has misapplied or misinterpreted this Court's decisions in similar cases. Nor is this petition based on the common assertion that the Court of Appeals has decided a case incorrectly. Rather, the Court of Appeals simply ignored this Court's remand directive in *Walters*. Grant of *certiorari* is therefore particularly appropriate. In *Lyng v. Payne*, 476 U.S. 926 (1986), for example, this Court had vacated a judgment and remanded with instructions to the appellate court to reconsider the case in light of a

particular case. *Id.* at 934. The appellate court in *Lyng* then "adhered to its prior views" and reinstated its decision. *Id.* This Court then granted *certiorari* to determine whether the appellate court properly followed the remand order. As in *Lyng*, the question is whether the appellate court here complied with this Court's remand order.

Accordingly, since the Court of Appeals' decision is not only at odds with this Court's applicable decisions, but more importantly is in direct conflict with this Court's remand order in *Walters*, the grant of *certiorari* is absolutely needed to preserve the authority of this Court.

C. *The Findings of the District Court on Remand Followed Exactly this Court's Directive in Walters*

On remand, the District Court conducted a lengthy trial, evaluating the demeanor of witnesses and reviewing thousands of pages of documents and deposition transcripts. Following the *Walters* remand directive to narrow the scope of the challenge to those claims which might be particularly complex, the District Court certified a sub-class of veteran victims of ionizing radiation. After exhaustive review of the evidence, the District Court found, as fact, that unrepresented veterans were not able effectively to sort through the complex factual, scientific, medical and legal issues in their claims without counsel, and that counsel would sharply decrease erroneous claim denial.

1. *Consistent with Walters, the District Court Evidence Showed Substantial Factual Complexities Facing Veterans Pressing Radiation Benefits Claims*

"[P]roperly developing the facts underlying these claims is an extremely intricate undertaking." *NARS Facts* at 1402. The District Court findings reflected what Amici have known for years: the true facts surrounding ionizing radiation claims are enormously complex, and in some cases have been actively concealed from claimants by their government.

Amici have found in working with unrepresented veterans that most are poorly equipped to understand the factual complexities of ionizing radiation claims. A typical handwritten claim from the files of Amicus RADLAW shows the level of sophistication with which unrepresented veterans typically approach these claims:

> I was one of (the personnel stationed at Camp Hanford) from 9/20/50 to 7/27/51. While I was their (*sic*) one day I saw a dead cat with yellow-green substance emanating from the cat's mouth. I told these (*sic*) to some VA doctor and one of them said that was radiation poisoning. So if that cat was dead from radiation poisoning what was it doing to me. And this is what has been happening to me in the last years. Saliva glands were enlarged in 1980. VA doctor removed one of the gland (*sic*). A year later doctor at VA found a tumor at the base of my throat. Three years I lost my other saliva gland at this time. I have been put on penicillin (*sic*) two times in the last (illegible) months (*sic*).

The veterans with whom Amici work are, as the District Court found, generally poor, and do not have the education or experience necessary adequately to pursue their benefits claims. On average, ionizing radiation claimants have not even completed high school. *NARS Facts* at 1406. Further, ionizing radiation claimants are "almost always in poor health." *Id.* at 1395.

As a result, veteran victims are not likely to have substantial resources to pursue lengthy challenges, or to pay for their medical care without benefits. Sixty-eight per cent of veteran victims of ionizing radiation have household incomes below $20,000 per year. *Id.* at 1396. At the same time, almost half of these veterans incur medical expenses of over $5,000 per year. *Id.* As a result, a "substantial majority" of claimants would rely on any benefits for "basic maintenance and support." *Id.*

The odds of an ionizing radiation-exposed veteran contracting a radiogenic disease amount to a national

tragedy. According to one follow-up study of causes of death among veterans of the CROSSROADS blast, conducted by Amicus National Association of Atomic Veterans, fully *78%* had died from lung cancer. Another study, reviewing causes of death of veterans of various atomic tests, showed that roughly *68%* died as a result of their service-related exposure to ionizing radiation.

When these unrepresented veterans have petitioned the government for redress, they have most often been told that their health problems could not have resulted from exposure. Only 250 out of 12,000 requests for monthly benefits based on radiogenic disease have been granted, amounting to a benefit granting rate of roughly *two* percent.

The sheer factual complexity of ionizing radiation claims makes it all but impossible for these poor, ill and uneducated veterans to secure their property rights without counsel. Applicable regulations found in the "M21-1" Adjudication Manual, for example, require a veteran to develop an almost encyclopedic concordance of information about nuclear blasts that occurred decades ago, including:

- The current diagnosis of the veteran's disease and, if known, the specific cell type and stage.

- The dates, places and circumstances of exposure to ionizing radiation, including the dates and place of test; operation by test shot code names; the number of tests witnessed; the organization or unit (ship, task group, company or squadron, etc.) and rank at the time of test; the duty, place and organization unit from which the veteran may have been detailed for participation; whether a film badge was issued and worn; and the names of other service personnel with the veteran at the time of participation.

- The veteran's history of exposure to known carcinogens.

- The history of members of the veteran's family who have been diagnosed as having cancer.

- A detailed description of activities during the entire period of participation, including: the distance of the veteran from the center of Ground Zero at the time of the explosion; at the time of each explosion, whether the veteran was in the open, under cover (building, closed vehicle, trench, and so forth), in a plane or aboard ship (on or below deck); whether the veteran moved to or toward Ground Zero after the explosion, how soon thereafter, and how close; and how long the veteran remained in the vicinity of the explosion, initially and after advancing.

Claims are granted only when the benefits director is "convinced sound scientific and medical evidence supports the conclusion it is at least as likely as not" that the claim is meritorious. The benefits director is seldom convinced. Thus, one begins to understand why only two percent of the 12,000 radiation exposure compensation claims submitted to the Veterans Administration have been allowed.

It would be difficult enough for poor, uneducated and ill veterans to assemble all of these facts and marshal them in a way to beat the two percent odds, and convince the benefits director of a claim's merit. Sadly, veterans face problems going beyond scientific and medical complexities. Upon remand, the District Court saw evidence of shocking efforts by the government or its representatives to tamper with evidence. Because of page limitations, Amici here detail only one example.[3]

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[3] The District Court also found that the government engaged in wholesale shredding of relevant evidence in this litigation -- triggering substantial sanctions. *National Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543 (N.D. Cal. 1987). The government does not appeal from that determination, so this final adjudication of destruction of evidence in a veterans claim case must be accepted as true.

Key to any veteran's claim for benefits is his ability to prove how close he was to a particular thermonuclear detonation. The relevant regulations require unrepresented veterans to prove adequate blast proximity to support an inference of radiogenic disease causation. The "dose reconstruction" for a veteran is thus absolutely key to whether he will receive benefits. *NARS Facts* at 1400. To show proximities, the government generated maps showing troop line locations at the time of a blast, and showing ground zero in relation to the troop line. Evidence at trial showed that *the "dose reconstruction" consultants retained by the government tampered with the blast maps, redrawing troop line movements, so that the resulting maps showed troops farther away from blasts than they actually were. These deceptive maps were then used to deny claims to unrepresented veterans.* A copy of such a map, showing the original and tampered troop lines, is appended to this brief as Appendix "A."

2. ***Consistent with Walters, the District Court Evidence Showed Substantial Medical Complexities Facing Veterans Pressing Radiation Benefits Claims***

The District Court found that "the medical issues present in [ionizing radiation] claims are far more complex than those in other [service connected disability or death] claims and that the average claimant is not capable of understanding the medical intricacies of an [ionizing radiation] claim." *NARS Facts* at 1398.

Extensive expert testimony was submitted showing the difficult medical issues involved in ionizing radiation claims, and how those complexities contribute to an unacceptable risk of error in the absence of retained counsel. *Id.* at 1398-99. These issues include the induction and etiology of cancer; use of medical tests and examinations; interpretation of epidemiological studies; use of radioepidemiological tables and probability analysis; dose-response curve models; manifestation determinations respecting radiogenic diseases; use of tissue samples and other clinical aspects; disease

definition or classification (*e.g.*, primary site of metastasis); latency periods; synergistic effects; and supervening causation. *Id.* at 1398. None of this evidence was before this Court in *Walters*, and was part of the factual record the *Walters* Court ordered to be prepared.

The government has also adopted an exclusive list of radiogenic diseases,[4] and has frequently argued that the high claims denial percentage flows from claims for non-listed diseases. This is really no defense. As trial testimony showed, there are many complex issues of interpretation and nomenclature of the radiogenic disease list. As a result, an unrepresented veteran who lists an incorrect name or condition may have his claim wrongfully eliminated at the screening stage. Additionally, there are complex issues of cancer site migration and whether the ionizing radiation regulations cover cancer which originated in a non-listed tissue and metastasized to a covered tissue, and vice versa.

3. *Consistent with Walters, the District Court Evidence Showed Substantial Scientific Complexities Facing Veterans Pressing Radiation Benefits Claims*

The District Court also made extensive findings of fact concerning the complexity of scientific issues in ionizing radiation claims, concluding that they are "beyond the capacity of a lay-claimant to understand." *NARS Facts* at 1399.

The District Court found substantial scientific complexities in dose reconstruction, due to flawed, sporadic and inaccurate use of film badges. *Id.* at 1400-01. The District Court also found serious factual

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[4] The applicable regulations recognize fifteen general disease types as radiogenic in origin: (1) leukemia, except chronic lymphatic leukemia; (2) thyroid cancer; (3) female breast cancer; (4) lung cancer; (5) bone cancer; (6) liver cancer; (7) skin cancer; (8) esophageal cancer; (9) stomach cancer; (10) colon cancer; (11) pancreatic cancer; (12) kidney cancer; (13) urinary bladder cancer; (14) salivary gland cancer; and (15) multiple myeloma. 38 C.F.R. § 3.31b(b)(2) (1992).

questions about radionuclides generated by nuclear devices; interpretation of radiation data readings; instrumentation problems; spread of environmental contamination; pathways of radiation exposure (whether external, internal or through absorption); monitoring equipment (*e.g.*, film badges); and approaches to scientific dose reconstructions. Dose reconstruction deficiencies in "official" dose estimates included use of inaccurate generic models, selective use of data, flawed input assumptions, and improper uncertainty analysis. The marked bias against ionizing radiation claimants further multiplies the risk of erroneous conclusions. *Id.*

4. *Consistent with Walters, the District Court Evidence Showed Substantial Legal Complexities Facing Veterans Pressing Radiation Benefits Claims*

The District Court considered voluminous evidence at trial showing the error at each stage of the adjudication process, all due to the legal complexity of the claims process. The District Court found the entire procedure was "byzantine." *NARS Facts* at 1403 n.9. Veterans must understand an "extensive body" of law (*id.* at 1396), including not only the applicable statutes, 38 U.S.C. sections 1-5000, but provisions of the Code of Federal Regulations, various undigested Veteran's Administration General Counsel opinions, decisions of the Board of Veterans' Appeals, and Veterans Administration circulars. *NARS Facts* at 1396.

Veterans must sort through a labyrinth of regulations to comply with filing deadlines.[6] The Veterans

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[6] Regulations regarding filing deadlines include: 38 C.F.R. § 20.302 (1993) (time limit for filing); *id.* § 20.303 (extension of time for filing); *id.* § 20.305 (computation of time limit); *id.* § 20.306 (legal holidays); *id.* § 20.400 (action by claimant or representative on notification of administrative appeal); *id.* § 20.401 (effect of decision on administrative or merged appeal on claimant's appellate rights); *id.* § 20.501(a) (notification of right to appeal in simultaneously contested claim); *id.* § 20.501(b) (time limits for filing substantive appeal in simultaneously contested claim); *id.* § 20.501(c) (time limit for filing supplemental statement of case in simultaneously contested claim); *id.* § 20.502 (time limit for response to notice of appeal by another

(continued...)

Administration is not required to notify claimants or their representatives of filing deadlines, and failure to meet deadlines can result in a claim's automatic dismissal.

In addition to the inherent complexity of the various sources of governing law, the more notable errors documented below were misapplications of regulations and standards, such as legal presumptions and the reasonable doubt standard; use of unpromulgated standards (*e.g.*, 5 rem minimum dose requirement for a medical opinion and the blanket denial of occupation force claims); screening errors involving the threshold criteria for ionizing radiation claims; and the failure to follow regulations regarding claim development, including medical examinations, opinions, records and dose reconstructions. *NARS Facts* at 1400-01.

The initial decision respecting a claim, or "rating decision," is made by a rating board. The rating board employs a complicated schedule for rating disabilities which prescribes specific percentages of disability for thousands of conditions. 38 C.F.R. § 4.1 *et seq.* (1992) Decisions of the rating agency "as to conclusions based on the evidence on file at [that] time" are "final and binding on all field offices of the Department of Veterans Affairs." *Id.* § 3.104(a).

The applicable regulations set forth three prerequisites that must be satisfied during initial review before the Veterans Administration will even pursue development of an ionizing radiation claim. First, the claimant must demonstrate that the veteran was "exposed to ionizing radiation as a result of participation in the atmospheric testing of nuclear weapons, the occupation of Hiroshima or Nagasaki, Japan, from September 1945 until July 1946, or other activities as claimed." *Id.* § 3.311b(b)(1)(i). Second, the claimant must establish that the veteran "subsequently developed a radiogenic disease specified in paragraph (b)(2) of this

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[5](...continued)
contesting party in simultaneously contested claim); and *id.* § 20.503 (extension of time for filing in simultaneously contested claims).

section." *Id.* § 3.311b(b)(1)(ii). Third, the claimant must establish that the listed radiogenic disease was "manifested" -- an undefined term -- within specified periods. *Id.* § 3.11b(b)(1)(iii).

Regulations provide that if the rating board determines that any one of the three threshold requirements of subsection (b) is not satisfied it shall determine that a disease did not result from exposure to ionizing radiation. *Id.* In such cases, the claim can only be granted if it falls within a presumptive period (*e.g.*, *id.* § 3.307), or the veteran can show occurrence or manifestation in service. *Id.* § 3.311b(h).

The Veterans Administration regional office is authorized to develop facts concerning the claim only if these three conditions are met. The regulations contain no provision specifying what factual information should be furnished for the purpose of reconstructing the dose. The M21-1 Manual establishes an additional limitation; section 22.05.1(c)(1) requires development only where initial review has revealed "a reasonable probability of a valid claim."[6]

To challenge an adverse regional office decision, the claimant must file a Notice of Disagreement ("NOD") within one year from the mailing of the claims decision. 38 C.F.R. §§ 20.201 (1993) and 20.302(a) (1993). Upon receipt of the NOD, the Veterans Administration may either reconsider its decision or, if the decision is adverse to the claimant, proceed to prepare a Statement of the Case ("SOC"), which summarizes the decision, the factual record and applicable law, and constitutes the final decision of the regional office. The preparation of the SOC is the first stage in the adjudication process in which the Veterans Administration conducts a global review of the claims file. In the SOC, the Veterans Administration, not the claimant, frames the issues on

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[6] In effect, this provision confers absolute discretion upon the regional office to arrest development of an ionizing radiation claim at an early stage with no review. *See also* 38 C.F.R. § 3.326 (1992) (providing for physical examinations only where "reasonable probability of valid claim is indicated").

appeal. If the claimant takes no action to follow up on the NOD (which is frequently the case), the file is closed.

The claimant may perfect an appeal by filing a "Substantive Appeal" within 60 days of mailing of the SOC (or the remainder of one year after the claims decision) (*id.* § 20.302(b)), which should "set out specific arguments relating to errors of fact or law." *Id.* § 20.202. The claimant is not presumed to agree with every statement of fact contained in the SOC to which an exception is taken in the Substantive Appeal. *Id.* Evidence at trial showed that over one-third of appeals instituted by NODs are never perfected.

The Board may dismiss any appeal which fails to allege specific error of fact or law. *Id.* If initial legal errors are made, the unrepresented veteran has no practical choice but to accept determination by the rating board. In one very recent example from the files of Amicus RADLAW, a claimant was denied benefits because the claimant's lung cancer did not cause greater than 10% disability *within one year of separation from service*. Of course, this is not a bar to claims, even under the restrictive regulations of the Veteran's Administration -- but without a lawyer, how is the disabled, impoverished and uneducated veteran to know the difference?

Although the government routinely points out these appellate procedures to show the fairness of the system, they amount to no more than a Due Process Potemkin Village. Though administrative appellate review exists on paper, the criminal prohibition against counsel forces veterans to navigate the appellate statutes and regulations alone.

5. *Consistent with Walters, the District Court Evidence Showed that Assistance of Counsel Would Sharply Increase a Veteran's Chances of Avoiding Improper Claim Denial*

The District Court found not only that the claims procedure is "complex" but found a "strong showing" that *because of that complexity* there was a "probability of erroneous denial" of ionizing radiation claims. *NARS Facts* at 1409. These findings reflect precisely the type of analysis ordered by the *Walters* Court. The law and procedures governing ionizing radiation claims were found to be a "complex web of government authority" that are "far more detailed and complex than that for other [service-connected death or disability claims]." *Id.* at 1396-97. The District Court found the medical and scientific issues to be beyond the understanding of claimants and that:

> adequate presentation and adjudication of [ionizing radiation] claims will generally require marshalling expert scientific and medical evidence in complex and disputed areas of the fields implicated.

Id. at 1402.

Trial evidence showed that attorney success rate on ionizing radiation claims was more than *25 times* higher than for those relying on service representatives, a statistically significant disparity. Attorneys are especially useful in obtaining documentary evidence necessary to support a claim. As the District Court found, evidence of bomb blast location must frequently be obtained through FOIA requests. *Id.* As demonstrated, *supra*, at p. 9, even if received, this information might well be altered by dose reconstruction consultants. Still further, much of the necessary information needs to be de-classified under the Secrecy Act, 50 U.S.C. § 401 -- which also requires assistance of counsel. *Id.* The District Court concluded:

> Given the tremendous diversity and complexity of the medical and scientific issues involved in [ionizing radiation] claims, it is not surprising that properly

> developing the facts underlying these claims is an extremely intricate undertaking. A plethora of information is useful in establishing pathways to which a veteran might have been exposed at the time of the nuclear explosion, and other factors which may have contributed to the claimant's health problems. Such information is essential to proving the level of radiation exposure, completing an individual dose reconstruction and demonstrating causation.

Id.

D. *The Ninth Circuit Failed to Give Proper Deference to the District Court's Findings of Fact*

In reversing, the Ninth Circuit failed to honor the fact findings of the District Court or to follow the *Walters* remand order. Federal Rules of Civil Procedure, Rule 52(a) is clear, and governed the Ninth Circuit's review of the District Court findings:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

The District Court made the factual findings as to each of the factors in the *Mathews* balancing test, as ordered by *Walters*. These conclusions were pure findings of fact; however, to the extent the government suggests they comprised mixed questions of fact and law, they should nonetheless be afforded the same deference. *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). The Ninth Circuit noted the "size and complexity of the record in this case and the fact-intensive nature of the district court's ruling." *NARS Appeal* at 587 n.6. Given the constitutional issues raised, however, the Ninth Circuit adopted a *de novo* review.

The Ninth Circuit never found that any of the District Court's fact findings were "clearly erroneous." Instead, it simply held that the fact findings did not exhibit due deference to Congress. *NARS Appeal* at 591. In other words, the District Court made extensive findings of fact showing an act of Congress was unconstitutional as applied to a particular class of veterans, and the Court of Appeals bypassed those findings by relying on observations of fact by the very Congress whose act was found unconstitutional. Through this circularity, *no* act of Congress could ever be found unconstitutional as applied, assuming Congress lards the Congressional Record with enough factual observations suggesting an act is constitutional.

The Court of Appeals relied solely upon *Walters* for this notion that District Court fact findings are irrelevant in the face of deference due to Congress. Of course, the Ninth Circuit misunderstood *Walters*: when this Court first saw this case, it was a fact-independent *facial* challenge, and deference to Congress was appropriate. However, the *Walters* Court expressly remanded the cause *for fact findings* on the as-applied challenge. This Court did not order an idle act; it intended that the District Court fact findings would be given weight.

II. ***CONCLUSION***

Based on its findings, the District Court held that the class of ionizing radiation victims made:

> an extraordinarily strong showing of the probability of erroneous denial of ionizing radiation claims under the existing system, and an equally strong showing that assistance of counsel will sharply reduce that possibility.

NARS Facts at 1409.

Ten thousand veterans have sacrificed their health and their lives in service to this nation. They ask for the right to choose whether to have assistance of counsel in pursuing enormously complex claims of delayed

manifestation radiogenic disease. Their Supreme Court held out a hope for these veterans in *Walters*, finding that an effective prohibition against counsel would be unconstitutional upon a showing of a risk of deprivation combined with a showing that counsel would sharply reduce that possibility. The District Court found everything required by *Walters*, but the Ninth Circuit took that assistance of counsel away by misunderstanding and ignoring this Court's ruling in *Walters*. The parties have argued the legal bases for *certiorari*; as Amici we go one step further. For their selfless dedication to the nation, for their sacrifices which helped defend the very Constitution whose protection they now seek, Amici urge that this Court owes these veterans one last chance to fulfill the promise made in *Walters*. *Certiorari* should be granted.

Dated: October 18, 1993

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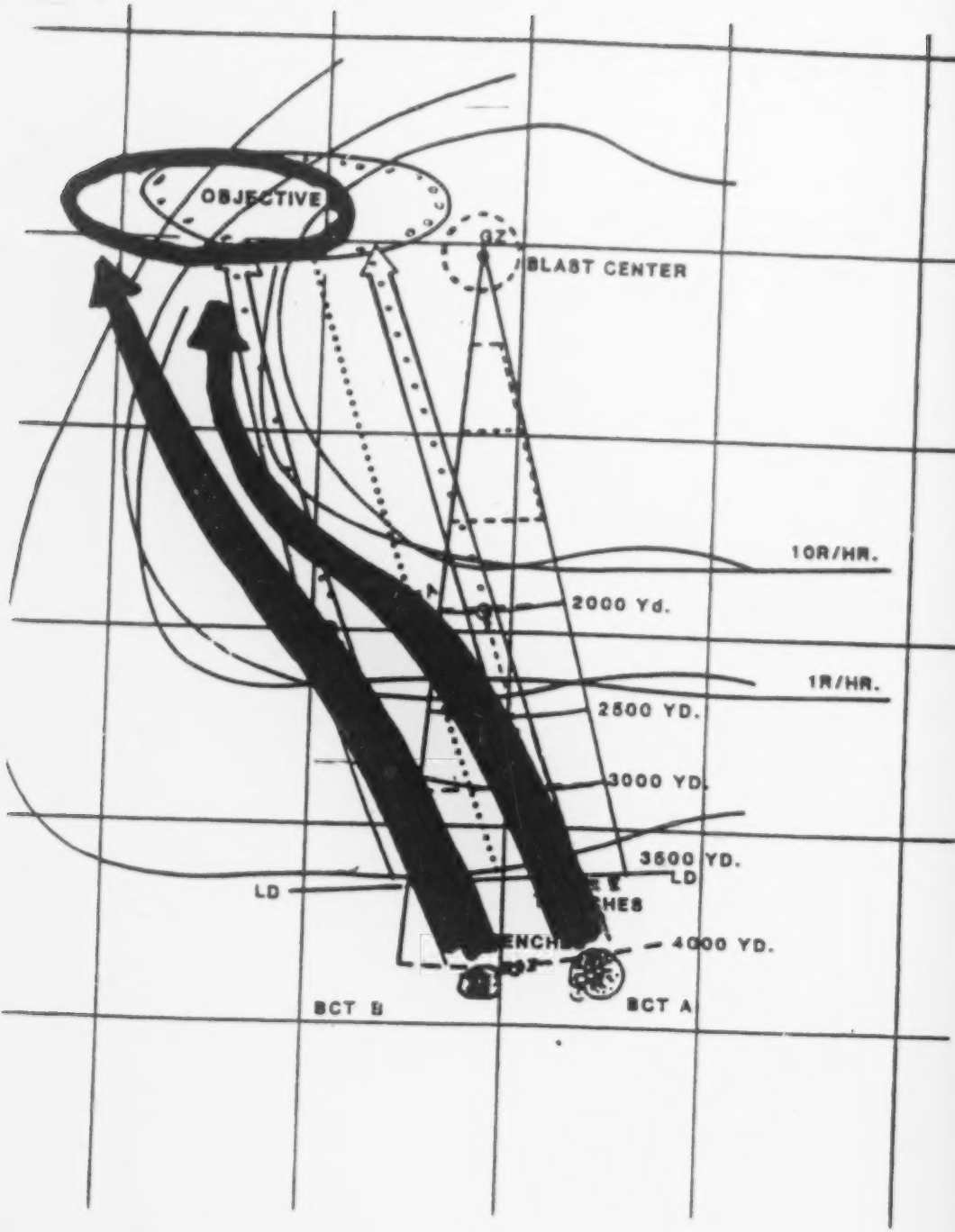
APPENDIX A

Appendix A is a copy of a map, introduced in evidence at trial, of the SHOT SIMON atmospheric test. The blast is shown as "GZ" ("Ground Zero"). Evidence at trial showed that the true location of troop line movements brought veterans to within yards of Ground Zero, as shown by the dotted lines. Dose reconstruction consultants employed by the government redrew the troop marching lines, as shown by the heavy black lines, so as to create an illusion that the veterans were much farther away from Ground Zero. This redrawn map was then used to deny claims to veterans.


OBJECTIVE
GZ
BLAST CENTER
10R/HR.
2000 Yd.
1R/HR.
2500 YD.
3000 YD.
3500 YD.
LD
LD
4000 YD.
BCT B
BCT A